In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-879

NCR EMPLOYEES' INDEPENDENT UNION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18–61) is reported at 466 F. 2d 945. The Board's decision and order (Pet. App. 63–95) are reported at 190 NLRB No. 117.

JURISDICTION

The opinion of the court of appeals was filed on August 18, 1972; a petition for rehearing was denied on September 19, 1972 (Pet. App. 62); and the judgment of the court of appeals was entered on September 26, 1972. The petition for a writ of certiorari was filed on December 15, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

495-296—73

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that the union used physical intimidation and threats of violence to prevent employees without union passes from working during a strike.

2. Whether the Board properly required the union to reimburse those employees who made payments to the union for picket lines passes, and to pay lost wages to those employees who refused to make such payments and were prevented from working during the strike.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 96–98.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On November 18, 1968, when negotiations failed to produce a new contract, employees of National Cash Register's Dayton, Ohio, industrial complex went on strike, causing a virtual shut down of operations (Pet. App. 67; A. 49a–50a).[1] The next day, pursuant to assurances previously given to representatives of the federal government, the Company and petitioner ("the Union") met to arrange for employees in the Military Division, who were working on military defense projects, to continue work during the strike (Pet. App. 67–68; A. 150a–151a, 179a, 182a). It was

[1] "A." refers to the printed appendix used in the court below, a copy of which we are lodging with the Clerk of this Court.

agreed that the Military Division employees would be asked to obtain a pass from the union hall in order to facilitate their passage through the picket lines which the Union had set up at most entrances to the plants (Pet. App. 68; A. 145a, 151a). Company supervisory personnel then telephoned each employee in the Military Division and advised him of the arrangement (Pet. App. 68; A. 58a, 73a, 145a–146a, 151a–152a).

When Military Division employees reported to the union hall that evening for their passes, they were told by Union representatives that, in order to obtain a pass, each employee had to sign a document in which he agreed to pay to the Union one-third of his gross daily wages during the strike (Pet. App. 68; A. 58a–60a, 94a–95a).[2] The decision that the Military Division employees would be required to contribute to the Union in order to receive a pass was made by the Union without the knowledge or consent of the Company (Pet. App. 69; A. 145a, 146a, 151a, 168a).

[2] The document stated (Pet. App. 68; A. 187a):

"In recognition of the fact that I am being permitted by the NCR–EIU to work on my job at NCR during the period of time that an authorized strike is taking place, and further recognizing that the Union's Executive Board has recommended that voluntary contributions be accepted from all Union Members who are being permitted to work during this period, I hereby freely consent to pay one-third (33⅓%) of my gross daily wages during this period, to the Union. In consideration of such contribution, it is my understanding that I am to be furnished authorization to cross the Union picket lines for the purpose of working at NCR during this period, and that I am obligated to obtain from the union a new work authorization on or prior to Monday of each week, for the duration of the strike."

Employees who objected to the Union-imposed pass requirement were told that they had to sign "to get the pass and that they would not be able to cross the picket lines without a pass" (Pet. App. 70–71; A. 58a–60a, 65a). Thus, when employee George Springer, who was not a Union member, objected to signing the form, he was told by a Union agent dispensing the forms: "Well, the agreement between the Company and the Union is that you can go to work. But you are not going to work without this pass. And you won't get the pass unless you sign this paper" (Pet. App. 70; A. 74a–75a). After Springer replied, "Well, all I was interested in was what did the Company want," the Union agent, in the presence of other employees seeking passes, stated: "Well, don't worry about that. There are going to be some pretty big boys on that picket line" (Pet. App. 70; A. 75a, 81a–82a, 177a).

The Company learned of the pass conditions from complaining employees. It told them that the Company had neither known about nor agreed to the conditions, and that it was for each employee to decide whether he would sign the document and come to work (Pet. App. 72–73; A. 76a, 78a, 154a–156a).

The strike was accompanied by mass picketing at the plant entrances. Cars of employees attempting to enter were blocked at the gates, and some cars were damaged in the resulting back-up (Pet. App. 73; A. 147a–148a, 152a, 157a–158a, 161a–163a). Employees attempting to cross the picket lines were stopped and checked for passes (Pet. App. 73; A. 161a–163a).

By November 22, the mass picketing had become so unruly that the Company feared for the safety of employees attempting to enter the plant without passes (Pet. App. 73; A. 147a–148a, 152a–153a). It therefore informed the Military Division employees that they would not be permitted to work unless they obtained passes from the Union (Pet. App. 73; A. 79a–80a, 91a–92a, 99a–100a, 120a–121a, 124a). Employees who would not agree to the Union's terms ceased work for the remainder of the strike (Pet. App. 73–74; A. 71a, 77a–80a, 86a–88a).[3]

B. THE DECISIONS BELOW

The Board found that the Union violated Section 8(b)(1)(A) of the Act by threatening, and actually using, physical force to prevent employees from working who did not obtain a Union pass (Pet. App. 76–77, 80).[4] The Board stated (Pet. App. 76):

> We do not here have before us a case in which the Union has merely imposed a fine or assessment equivalent to one-third of the wages earned by the Union member while working during the strike, which fine or assessment is

[3] On November 23, the Company obtained, in the state courts, a temporary restraining order limiting the number of pickets at each entrance, and forbidding intimidation and harassment of persons seeking to enter or leave the Company's premises (Pet. App. 74; A. 164a–165a, 210a–212a). The Union's mass picketing activities continued despite the injunction (A. 165a–166a).

[4] The Board also found that the Company violated Section 8(a)(1) of the Act by acquiescing in the Union's pass requirement and by refusing, after November 25, to allow its employees to work without a pass (Pet. App. 79–80).

> to be enforced through court proceedings or by expulsion from membership until the fine is paid. Indeed, we do not even have a fine or assessment confined to union members. The contribution sought by the Union was from union members and nonmembers alike. Provisions for enforcing it were not by the normal means but rather by threats to prevent, and actual attempts physically to prevent, the employees from working. * * *

The Board ordered the Union and the Company, jointly and severally, to make whole for any loss of wages the employees who, as a result of the pass requirement, failed to work during the strike (Pet. App. 81). Further, the Board ordered the Union primarily, and the Company secondarily, to reimburse the employees for the sums of money collected by the Union as a condition of granting its pass (Pet. App. 81–82).

The court of appeals, with minor modifications, sustained the Board's findings and conclusions, and enforced its order (Pet. App. 18–61).

ARGUMENT

1. The first issue raised in the petition (Pet. 2)—whether a union may issue to employees "picket line passes in exchange for contributions to the union, where there is no union sponsored program of collection or enforcement by coercion or intimidation"—is not presented on this record. The court below expressly stated: "We may assume, *arguendo,* that a union may inaugurate a voluntary contribution program and request members and non-members to pay

a portion of the wages they earn during a strike as a donation to the union's strike effort" (Pet. App. 37). Here, however, the Board found, and the court agreed, that the Union had used physical force and other unacceptable means[5] to coerce cooperation with its pass system (Pet. App. 42).

The only issue actually presented, therefore, is whether the Board's factual finding is supported by substantial evidence. That evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, as shown by the Statement and by the opinion of the court below (Pet. App. 40–42), there is ample support in the record for the Board's finding that the Union used coercive means to enforce its pass system.

2. Similarly, petitioner's attack on the Board's reimbursement order (Pet. 3, 12–16) is based on the premise that the employees "voluntarily" made contributions to the Union in return for the pass, and that employees without passes were prevented from working as a result of the Company's "unilateral" action. The facts, however, as found by the Board and confirmed by the court below, are that the Union coerced the employees to make payments to it, and that "it was the union's conduct in coercing the Military Division employees to obtain passes that caused

[5] While a union may enforce a valid internal rule by such techniques as "fines, collected by threat of expulsion or judicial action," it may not resort to "means unacceptable in themselves, such as violence or employer discrimination." *Scofield* v. *National Labor Relations Board*, 394 U.S. 423, 430–431.

the company to discriminate against them" (Pet. App. 49). In these circumstances, the Board properly required the Union to reimburse the employees for the payments exacted from them, and for their lost wages.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
LINDA SHER,
Attorney,
National Labor Relations Board.

FEBRUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973